WRITTEN TESTIMONY
OF
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United States House of Representatives

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Representative Conyers, Democratic members of the House Judiciary Committee, my name is Jonathan Turley and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair for Public Interest Law. Given the limited time available today, I have submitted this longer written statement to accompany my oral testimony today.

My interest in the current controversy over the President's domestic spying operation is based on both my work as an academic and as a litigator in the areas of national security and constitutional law. As an academic, I have written extensively on electronic surveillance as well as constitutional and national security issues. I also teach constitutional law, constitutional criminal procedure and other subjects that related to this area. As a litigator, I have handled a variety of national security cases, including espionage and terrorism cases involving classified evidence under both the Classified Information Procedures Act (CIPA) and FISA.[1] I am appearing today, however, in my academic capacity to address the serious constitutional and criminal questions raised by this domestic spying operation.

I greatly appreciate the opportunity to discuss this operation today and its implications for our constitutional system.

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[1] I currently represent Dr. Ali Al-Timimi who is believed to have been a subject of the NSA operation and is currently seeking judicial review of that operation.

I. OVERVIEW

The disclosure of the National Security Agency's (NSA) domestic spying operation on December 16, 2005[2] has pushed this country deep into a constitutional crisis with few parallels in our nation's history. At issue is the most fundamental principle of a Madisonian system: a government of shared and limited powers. President George W. Bush has claimed the authority to violate federal statutes when he believes it is necessary for the nation's security. Such a claim of authority would upset the delicate balance of power in our tripartite system of government and convert the Chief Executive into a type of maximum leader; the very scourge that led our Framers to form this Republic.

The NSA operation is only the latest manifestation of the President's extreme views of his inherent authority and supremacy over the other two branches of government. In its infamous August 1, 2002 "Torture Memo," the Justice Department wrote that President Bush's declaration of a war on terrorism could "render moot federal law barring torture." Indeed, as in its current memorandum, the Justice Department argued that the enforcement of a statute against the President's wishes on torture "would represent an unconstitutional infringement of the president's authority to conduct war." While Attorney General Gonzales publicly rejected the claims of unilateral authority in this memo during his confirmation hearings, he was aware that the NSA operation was based precisely on the same claim of authority.

The President also assumed unlimited powers in his enemy combatant policy, where he claimed the right to unilaterally strip a citizen of his constitutional rights (including his access to counsel and the courts) and hold him indefinitely.

On December 30, 2005, President Bush again claimed authority to trump federal law in signing Title X of the FY 2006 Department of Defense Appropriations Act. That bill included language outlawing "cruel, inhumane or degrading treatment" of detainees, such as "waterboarding", the pouring of water over the face of a bound prisoner to induce a choking or drowning

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[2] James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at 1.

reflex. In a signing statement, President Bush reserved the right to violate the federal law when he considered it to be in the nation's interest.[3]

Now, the Administration claims the same authority to violate federal surveillance laws. It is clear that the subject matter of the federal law is irrelevant. So long as he is acting under the color of national security, the President claims to possess authority to violate federal and international law at his whim and discretion. Thus, whether a law deals with criminal assault, banking or privacy, the President reserves the right to adhere to or ignore the laws passed by Congress. No argument is more anathema to our system of government. The President's position is devoid of any limiting principle; it places the country on a slippery slope that inevitably leads to an unchecked maximum leader.

If there was any doubt as to the President's extreme claim of authority, it is quickly dispelled by a reading of the extraordinary document released by Attorney General Alberto Gonzales yesterday afternoon. Entitled "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," this white paper offers a theory of presidential power that is potentially limitless. Frankly, it is a document remarkable not only in its sweeping claims of authority but its conspicuous lack of legal authority to support those claims. It is also remarkably close to the arguments contained in the discredited Torture Memo.

While I only received this white paper yesterday afternoon, I would like to offer a brief analysis of its claimed authority.

II. THE SEPARATION OF POWERS AND FISA

Our system of government is based on the doctrine of the separation of powers with three co-equal branches. Under this system, no branch has the ability to govern alone. On its most basic level, the branches are given primary roles in the making of laws (the Legislative), the enforcement of

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[3] The very concept of a signing statement is antagonistic of legislative authority when used, as here, to try to curtail the scope or meaning of a law – particularly after the President opposed the law as he did the prohibition on torture.

laws (the Executive Branch), and the interpretation of laws (the Judicial Branch). While the Executive Branch also has an interpretive function performed by federal agencies, Congress clearly can dictate the conditions and procedures that govern the use of electronic surveillance in the United States.

The separation of powers is not suspended in wartime. To the contrary, the tripartite system is most important during such precarious times. As the Court said in *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952), the Founders of this Nation entrusted the lawmaking powers to the Congress alone in both good and bad times." In the *Steel Seizure Case*, the Court rejected President Harry Truman's seizure of steel mills as a wartime necessity. That case rejected claims virtually identical to those made by President Bush. The Court stressed that such important questions as the authority to seize private property "is a job for the Nation's lawmakers, not for its military authorities."

In his important concurrence to that decision, Associate Justice Robert Jackson stressed that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[4] Despite the legal spin contained in the Justice Department's paper, President Bush is acting in direct contravention of a federal statute (and a criminal prohibition) in ordering warrantless domestic surveillance under the NSA operation

Under its lawmaking authority, Congress enacted FISA. This law was a compromise that allowed surveillance to be conducted below the probable cause standard of the Fourth Amendment, but required limited judicial review. Under Section 1801(f), the statute covers "any acquisition of . . . the contents of any wire or radio communication" under specified conditions. The NSA operation was described by Attorney General Gonzales as involving "intercepts of *contents of communications where one . . . party to*

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[4] In his three categories of presidential action, Jackson also described a president acting under an express or implied authorization of Congress, where his authority "is at its maximum." Alternatively, a president can act without a congressional mandate but on "his own independent powers, where his relative authority vis-à-vis Congress is in equipoise.

the communication is outside of the United States."[5] It has been suggested that this operation included calls from within the United States to a foreign location as well as some purely domestic calls. There is little debate of the fact that the interceptions under the NSA operation fit the definition of intercepts covered by FISA. Indeed, Attorney General Gonzales conceded that the NSA operation constitutes the type of interception that "requires a court order before engaging in" "unless otherwise authorized by statute or by Congress."

The Congress enacted the so-called "exclusivity provision" to avoid any dangerous ambiguity on this point. Title III of the Omnibus Crime Control and Safe Streets Act was amended to state that "procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of that Act, and the interception of domestic wire, oral, and electronic communications may be conducted."

The exclusivity provision expressly triggers the standard laid out by Justice Jackson. This point was made by the court in *United States v. Andonian*, 735 F.Supp. 1469 (C.D. Cal. 1990), which noted that Congress enacted FISA to "sew up the perceived loopholes through which the President had been able to avoid the warrant requirement."

FISA does allow for exceptions to be utilized in exigent or emergency situations. Under Section 1802, the Attorney General may authorize warrantless surveillance for a year with a certification that the interception is exclusively between foreign powers or entirely on foreign property and that "there is no substantial likelihood that the surveillance will acquire the contents of any communications to which a United States person is a party." No such certification is known to have occurred in this operation. Nor was there an authorization under Section 1805(f) for warrantless surveillance up to 72 hours under emergency conditions. Finally, there was no claim of conducting warrantless surveillance for 15 calendar days after a declaration of war, under Section 1811.

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[5] Press Release, White House, Press Building by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005).

With no exceptions under the Act, the NSA operation clearly conducted interceptions covered by the Act without securing legal authority in violation of Section 1809.

The President has publicly admitted to at least 30 orders to conduct such unlawful surveillance and promised to continue to issue such orders in the future. Each of these orders constitutes a separate criminal act under federal law.

A violation of Section 1809 is "punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both." Likewise, an institutional defendant can face even larger fines and, under Section 1810, citizens can sue officials civilly with daily damages for such operations.

Faced with compelling allegations that the President knowingly ordered a series of federal crimes (over the objections of some lawyers within his Administration), the Justice Department seems to struggle to find a loophole. Indeed, the white paper released yesterday leaves the impression of an intelligence operation in search of a legal rationale; flailing around Article I and Article II for some constitutional footing to justify this action. However, the core legal claims advanced by the Justice Department seriously undermine the credibility of the government in this controversy. I would like to briefly address five core claims made by the government.

III. THE ADMINISTRATION'S CLAIMS OF AUTHORITY IN YESTERDAY'S DOJ WHITE PAPER

First Claim: The President's Inherent Authority Trumps Federal Law and Fourth Amendment Protections.

The Administration insists, as it did previously on the subjects of torture and enemy combatants, that the President can act outside of federal law or in contravention of federal law under his inherent Article II powers. As noted earlier, the careful balancing of powers in our system would be meaningless if the President had the discretion to unilaterally ignore the authority of the judicial or legislative branch in the name of national security. Some of the greatest injuries suffered by this nation have been self-inflicted wounds often meted out by a president claiming to be acting to protect national security. The surveillance of Dr. King, the spying on civic and political groups, the exposure of citizens to radioactive or chemical

harms were all done in the name of national security. It is far more likely that abuses of power will be justified in the name of national security than any other rationale. Great crimes are usually defended as made necessary by great causes.

The legal authority claimed to justify this position is wildly misplaced. For example, the Justice Department places great weight on the so called *Keith* case. *United States v. United States District Court*, 407 U.S. 297 (1972) ("the *Keith* case") occurred before the passage of FISA. More importantly, the Court did not say that the President could conduct warrantless domestic surveillance. To the contrary, the Court first affirmed that all surveillance conducted for domestic criminal investigation must satisfy the Fourth Amendment. As to operations conducted for purely foreign intelligence, the Court reserved the question. The Court stated that "[w]e have not addressed and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents but that surveillance without a warrant might be constitutional in cases where the target was an agent of a foreign power." In *Keith*, the Court stressed that "Fourth Amendment freedoms cannot properly be guaranteed if domestic surveillance may be conducted solely within the discretion of the Executive Branch."

The Court in *Keith* went on to reaffirm the authority of Congress to enact laws tailored to national security surveillance and that "prior judicial approval is required for the type of domestic surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as Congress may prescribe." It is important to note that the Court ruled despite the claims by the government that it was acting in the name of national security since this was an investigation into a conspiracy to bomb a CIA office in Michigan. Those claims were rejected and the Fourth Amendment reaffirmed as controlling in the case.

The reliance on *Hamdi v. Rumsfeld* is equally unavailing. In that case, the President claimed absolute authority to hold citizens indefinitely as enemy combatants and to strip them of their constitutional rights. The plurality did recognize that holding enemy combatants like Hamdi was justified under the Force Resolution. This point was not unexpected since Hamdi was captured on a hot battlefield in the middle of large-scale military operations. However, the plurality *rejected* the President's claims of supreme authority and arguments more relevant to the current controversy.

The Court emphasized that the Constitution "envisions a role" for judges "when individual liberties are at stake," and rejected the claims by the President that he could circumvent the Judicial Branch in carrying out duties under the color of national security. Indeed, even when a war is declared by Congress, the Court noted that it is not "a blank check for the President when it comes to the rights of the Nation's citizens."

Likewise, the government relies on *In re Sealed Case*, a decision of the United States Foreign Intelligence Surveillance Court of Review. This is the only opinion ever issued by that Court and the decision has been widely criticized for its loose analysis. However, the Court does not state that the President has authority to violate FISA. In two statements of dicta, it recognizes that warrantless searches are permissible under certain circumstances and that the President possesses inherent authority in the area. Yet, the Court upholds FISA as a constitutional statute regulating the use of national security surveillance. The issue was whether FISA is violative of the Fourth Amendment since it does not require the constitutional standard of probable cause. The Court found that the provisions of FISA were sufficient even though they allow searches without a Fourth Amendment warrant. Thus, it was FISA itself that was being compared to a warrantless search, but found to be adequately protective to be reasonable under the Constitution. More importantly, FISA was found constitutional because it had the very procedure protections that are absent in the NSA operation. Rather than supporting the claims of the Administration, the case would strongly suggest that the NSA operation is not "reasonable" under even the lower standard applied to limited areas of "special needs."

The Administration also cites historical sources suggesting that various prior presidents ordered warrantless surveillance. However, most of these examples came before FISA was enacted, a law that was motivated by the desire to stop further excesses of presidents.[6] The Senate stressed that FISA "was designed . . . to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." Indeed, many of the cases cited by the Administration in the last few weeks have been pre-FISA cases, a misleading practice criticized in past cases. *See United States v. Bin Laden*, 126 F. Supp.2d 264 (S.D.N.Y. 2000) ("All of the circuit cases finding a foreign intelligence exception [to the warrant requirement] arose

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[6] S. Rep. No. 95-604(I), at 7, 1978 U.S.C.C.A.N. 3904, 3908.

before the enactment of FISA . . . and are probably now governed by that legislation).

Second Claim: The NSA Operation was Necessary Because There WAS No Time to Secure FISA Orders.

Perhaps the most disingenuous argument made by the President in support of the NSA operation was that he had to act without the delay of seeking a FISA order. FISA expressly allows for the government to conduct surveillance in such emergencies, so long as the intercept is submitted for judicial review within 72 hours. Indeed, in the case of a properly declared war, the President has "fifteen calendar days following a declaration of war by the Congress" to engage in surveillance without judicial approval. 50 U.S.C. §1811.

Third Claim: The Force Resolution Gave the President Authority to Circumvent Federal Law like FISA.

The Justice Department has argued that the Force Resolution gave the President authority to ignore federal laws like FISA in its broad authority to use "all necessary and appropriate force" against those responsible for the September 11th attacks.[7] This is essentially an argument that FISA was repealed by implication. Federal courts have been consistent in demanding express congressional statements to repeal or nullify federal statutes. Repeals by implication are heavily disfavored. *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001) (noting repeals by implication are "strongly disfavored" and require "overwhelming evidence.").

Moreover, it is preposterous to suggest that Congress contemplated, let alone approved, a resolution that would nullify major federal statutes. There is not a single reference in legislative history to support such a theory. To the contrary, the legislative history shows a Congress that was refusing some of the same sweeping authority now claimed by the President. It is absurd to argue that, after refusing such changes, Congress passed a sweeping open-ended resolution allowing the President to circumvent any federal law in the interests of national security.

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[7] Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).

Ironically, this is similar to the facts of the *Steel Seizure Case* where the Court noted that Congress had been asked and rejected authority for such seizures by the President. As Associate Justice Felix Frankfurter noted,

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is . . . to disrespect the whole legislative process and the constitutional division of authority between President and Congress."

The President had asked Congress for changes to FISA and other laws that were not granted by Congress. Indeed, if the President is correct about his inherent authority, there was no need to ask for the PATRIOT Act or later changes in federal law since he stands supreme as both law giver and law enforcer. Instead, his representatives stressed that the changes were urgently needed to do what had to be done to protect the nation.

To support this argument, the Justice Department insists that the Supreme Court recognized that the Force Resolution gave sweeping authority to the President in *Hamdi v. Rumsfeld*. However, the Court **rejected** the President's claims that he could use the Force Resolution as authority to hold people indefinitely and deny them basic liberties. The plurality held that such claims were "not authorized" under the Force Resolution, even for enemy combatants.

Fourth Claim: The Force Resolution was a Statutory Authorization Under FISA.

The Justice Department also claims that the NSA operation was lawful because it was a "statute" for the purposes of FISA's exception under Section 1809. Under that section, FISA states that it is only unlawful to conduct "electronic surveillance under color of law except as authorized by statute." The claim is that the Force Resolution is a statute authorizing this type of operation and therefore renders the operation lawful under FISA.

First, as noted above, the Force Resolution cannot be reasonably interpreted as authorization to circumvent any statute, let alone a critically important statute like FISA.

Second, the Force Resolution is not a statute for the purposes of Section 1809. This section allowed for a substantive statutory change in surveillance procedures or authority. This language would make little sense if any resolution supporting military action would allow nullification of the FISA's provisions. Indeed, such a resolution would not meet the standards for amending or nullifying a more specific statute. *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001) (requiring are "strongly disfavored" and require "overwhelming evidence.").

Third, even if the Force Resolution is deemed a statute for these purposes, there is a general rule that a more specific statute trumps a more general statute. When faced with a carefully drawn statute, courts will not nullify its provisions due to a conflict with a general statute. *Morales v. TWA, Inc.*, 504 U.S. 374, 384-85 (1992).

These dubious arguments are supported by equally dubious authority. The Justice Department places great reliance on high school search cases to construct new sweeping authority for the President. However, cases like *Earls* and *Veronica* were carefully tailored for the special environment of a public school. They are hardly a compelling basis for a new discretionary presidential power over federal law.

Fifth Claim: The Principle of Constitutional Avoidance Requires the Interpretation of FISA to Accommodate the President's Claim of Inherent Authority.

The Justice Department also claims that the doctrine of constitutional avoidance militates a more liberal interpretation of FISA to avoid a conflict with the President's inherent authority. This argument is, in my view, frivolous.

The Supreme Court has stressed that this "canon of constitutional avoidance has no application in the absence in the absence of statutory ambiguity." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 494 (2001). There is no such ambiguity in FISA which is detailed and has been applied for decades. Just because a president refuses to comply with

federal law does not make the law ambiguous. If a president claimed the right to violate in interstate car theft, the criminal code would not instantly become ambiguous because he failed to see its applicability to his own conduct.

The President may claim that FISA is unconstitutional as intruding upon his inherent authority – a dubious argument at best. However, he cannot legitimately claim that it is ambiguous and subject to the doctrine of constitutional avoidance.

III. CONCLUSION

This growing constitutional crisis will call upon members of this body to take a stand. The Framers expected that, even when affiliated politically with a president, Congress would act to protect its own institutional authority and to preserve the integrity of the tripartite system of governance. Thus far, while the judiciary has been asserting its independence and authority vis-à-vis the President, it is not clear that this trust was well-placed in Congress. These are dangerous times for our constitutional system. It is often the case that our greatest threats come from within. Indeed, Justice Brandeis warned the nation to remain alert to the encroachments of men of zeal in such times:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding.

Members should not engage in the dangerous delusion that they can remain silent and thus remain uncommitted in this crisis. Remaining silent is a choice; it is a choice to permit the assertion of raw, unchecked authority by a single individual.

I hope that members of this branch will heed the call of the Framers to act to preserve the vital balance of power in our system. What is at stake is not merely the issue of a president committing federal crimes, but a president who commits such crimes under a claim of absolute authority. It is far more dangerous when crimes are committed under the false pretence of

legality. It is an abuse of power that can corrode a system from within. It can lure other branches into a dangerous passivity and to eventual obsolescence. Few members of Congress have faced such a challenge in their careers. Yet, I believe that we are all (citizens and members alike) now called to account for the many benefits that we have received from our constitutional system. I commend you and your colleagues in taking action to address these violations and their significance for our country.

Thank you for the opportunity to speak with you today and I would be happy to answer any questions that you might have at this time.

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